(1)

Supreme Court, U.S.
FILED

03-383 JUN 30 2003

No. _____

In The

Supreme Court of the United States

JOSIAH L. HOOHULI; PATRICK L. KAHAWAIOLAA; VIRGIL E. DAY; and SAMUEL L. KEALOHA, JR.,

Petitioners,

v.

LINDA LINGLE, *et al.*

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

A. Whether native Hawaiian beneficiaries of programs established by the State of Hawaii for the betterment of the conditions of Hawaiians and native Hawaiians have a right to intervene pursuant to Fed.R.Civ.Proc., Rule 24(a)(2), in a civil action challenging the constitutionality of said programs in order to join in the Plaintiff's challenge of the provision of benefits to Hawaiians and oppose Plaintiff's challenge to the provision of benefits to native Hawaiians?

B. Whether the Court of Appeals erred in requiring intervenors to meet a compelling burden or showing that governmental entities did not adequately represent their interests?

PARTIES TO THE PROCEEDING

Petitioners:

JOSIAH L. HOOHULI; PATRICK L. KAHAWAIOLAA; VIRGIL E. DAY; and SAMUEL L. KEALOHA, JR.,
Intervenors-Appellants below.

Respondents:

EARL F. ARAKAKI; EVELYN C. ARAKAKI; SANDRA PUANANI BURGESS; EDWARD U. BUGARIN; PATRICIA A. CARROLL; ROBERT M. CHAPMAN; BRIAN L. CLARKE; MICHAEL Y. GARCIA; ROGER GRANTHAM; TOBY M. KRAVET: JAMES I KUROIWA, JR.; FRANCES M. NICHOLS; DONNA MALIA SCAFF; JACK H. SCAFF; ALLEN H. TESHIMA and THURSTON TWIGG-SMITH;
Plaintiffs-Appellees below;

LINDA LINGLE, in her official capacity as the governor of the State of Hawaii; GEORGINA KAWAMURA, in her official capacity as Director of the Department of Budget and Finance, RUSS K. SAITO, in his official capacity as State Comptroller and Director of the Department of Accounting and General Services; PETER YOUNG, in his official capacity as Chairman of the Board of Land and Natural Resources; SANDRA LEE KUNIMOTO, in her official capacity as Director of the Department of Agriculture; TED LIU, in his official capacity as Director of the Department of Business, Economic Development and Tourism; RODNEY K. HARAGA, in his official capacity as Director of the Department of Transportation,
State Defendants-Appellees below;

HAUNANI APOLIONA, Chairman; and ROWENA AKANA, DONALD B. CATALUNA, LINDA DELA CRUZ, DANTE CARPENTER,

COLETTE Y. P. MACHADO, BOYD P. MOSSMAN, OSWALD STENDER, and JOHN D. WAIHE'E, IV, in their official capacities as trustees of the Office of Hawaiian Affairs,
OHA Defendants-Appellees below;

MICAH KANE, Chairman, and WONDA MAE AGPALSA, HENRY CHO, THOMAS P. CONTRADES, QUENTIN KAWANANAKOA, HERRING K. KALUA, MILTON PA, and JOHN A. H. TOMOSO, in their official capacities as members of the Hawaiian Homes Commission,
HHCA/DHHL Defendants-Appellees below;

ANTHONY SANG, SR.; STATE COUNCIL OF HAWAIIAN HOMESTEAD ASSOCIATIONS; HUI KAKO'O AINA HO'OPULAPULA; BLOSSOM FEITEIRA; and DUTCHY SAFFERY,
Defendant-Intervenors-Appellees below;

THE UNITED STATES OF AMERICA,
Defendant below; and

MAUI LOA and JAMES TORIO,
Intervenors-Applicants.

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CITATIONS OF REPORTS OF OPINIONS AND ORDERS ENTERED IN THE CASE

The decision of the Ninth Circuit Court of Appeals in this case is reported at *Arakaki v. Cayetano*, 324 F.3d 1078 (9th Cir. 2003).

In the
Supreme Court of the United States

JOSIAH L. HOOHULI; PATRICK L. KAHAWAIOLAA; VIRGIL E. DAY; and SAMUEL L. KEALOHA, JR.,

Petitioners,

v.

LINDA LINGLE, *et al.*

Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners, JOSIAH L. HOOHULI *et al.*, respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in *Arakaki v. Cayetano*, 324 F.3d 1078 (9th Cir. 2003).

OPINIONS IN THE CASE

This is a petition for a writ of certiorari directed to the Ninth Circuit Court of Appeals seeking review of the judgment of that court, entered March 31, 2003, and amended May 13, 2003, in *Arakaki v. Cayetano*, 324 F.3d 1078 (9th Cir. 2003), affirming the ORDER AFFIRMING ORDER DENYING MOTION TO INTERVENE, filed June 13, 2002, in the District Court for the District of Hawaii, Civil No. 02-00139. This court has jurisdiction of this matter pursuant to 28 U.S.C. § 1254(1).

JURISDICTION

This is a petition for writ of certiorari directed to the U.S. Court of Appeals for the Ninth Circuit to review the judgment filed and entered on March 31, 2003 and amended May 13, 2003, in *Arakaki v. Cayetano, supra*. This Honorable Court has discretionary jurisdiction to review cases in United States

Courts of Appeals by way of writ of certiorari as provided by 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED IN THE CASE

Fed.R.Civ.Proc., Rule 24(a):

(a) Intervention of Right.

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT OF THE CASE

The Office of Hawaiian Affairs ("OHA")is an agency established by Article XII of the Constitution of the State of Hawaii and H.R.S., Chapter 10, purportedly for the betterment of the condition of Hawaiians and native Hawaiians as defined in H.R.S. § 10-3(1) and (2) respectively.

The term "native Hawaiian" is defined with reference to the term "native Hawaiian" as defined in Section 201(7) of the Hawaiian Homes Commission Act, 1920, 42 Stat. 108, P.L. 67-34 ("HHCA"). Basically, "native Hawaiian" means a person having not less than one-half part aboriginal Hawaiian blood.

The term "Hawaiian" was originally defined in an Article XII, § 7 proposed as an amendment to the Hawaii Constitution by the 1978 Constitutional Convention as any aboriginal Hawaiian without regard to blood quantum. However, that amendment was not properly ratified by the electorate. *Kahalekai v. Doi*, 60 Haw. 324, 342, 590 P.2d 543, 555 (1979). Therefore, the state legislature adopted essentially the same definition legislatively by enacting H.R.S. § 10-3(1).

The terms "Hawaiian" and "native Hawaiian" are often confused by the use by OHA, courts and Congress of a term "Native Hawaiians" (with a capital "N"), in reference to aboriginal Hawaiians without regard to blood quantum.

In this petition the term "native Hawaiian" will refer to a person of ***not less than*** one-half part aboriginal Hawaiian blood as defined in the HHCA. The term "Hawaiian" will refer to persons of ***less than*** one-half part aboriginal Hawaiian blood. Hawaiians and native Hawaiians collectively (or in other words "Hawaiians" as defined by H.R.S. § 10-3(1)) shall be referred to as "aboriginal Hawaiians."

Article XII, Section 5 of the Hawaii Constitution provides that OHA trustees shall be aboriginal Hawaiian and shall be elected by aboriginal Hawaiians as provided by law. In *Rice v. Cayetano*, (*Rice v. Cayetano I*), 941 F.Supp. 1529 (D.Haw. 1996), Plaintiff, Harold F. Rice, challenged this restriction of his right to vote as being a denial of his rights under the Fourteenth and Fifteenth Amendments to the U.S. Constitution.

In *Rice v. Cayetano I*, the district court denied Rice's request for an injunction preventing the disclosure of results of an OHA plebiscite in which only aboriginal Hawaiians were allowed to vote. The state defendants argued that aboriginal Hawaiians are analogous to Indian tribes and, under *Morton v. Mancari*, 417 U.S. 535 (1974), the rational basis test ought to be applied rather than the strict scrutiny test applied in cases of alleged racial discrimination under the Fourteenth and Fifteenth Amendments.

The district court noted that the validity of this argument might depend upon whether or not aboriginal Hawaiians are entitled to federal recognition as an Indian tribe. Judge Ezra observed:

> The court is acutely aware of the fact that *Morton* discusses (a) federally recognized tribes, and (b)

> preferential legislation for these tribes by the *federal* government. The court further acknowledges that *Morton* is premised on the historically unique relationship between the federal government and American Indians, "who are the wards of the nation, dependent upon its protection and good faith." *Carpenter v. Shaw*, 280 U.S. 363, 50 S.Ct. 121, 74 L.Ed. 478 (1930).

Rice v. Cayetano I, supra, 941 F.Supp. at 1541.

Judge Ezra was also aware that the Indian Reorganization Act of 1934, 48 Stat. 984 (June 18, 1934) and, most importantly, the regulations governing recognition of Indian tribes by the Secretary of the Dept. of the Interior, 25 C.F.R., Part 83, are limited in their scope of applicability to the "continental United States." *Rice v. Cayetano I, supra*, 941 F.Supp. at 1542, fn. 16. Judge Ezra accepted this arbitrary exclusion of aboriginal Hawaiians from the provisions of 25 C.F.R., Part 83, as lawful and concluded that aboriginal Hawaiians are not a federally recognized tribe and are not even eligible for such recognition. *Rice v. Cayetano I, supra*, 941 F.Supp at 1542. Judge Ezra denied the requested injunction, however, because he concluded that Rice was unlikely to prevail on the merits and would suffer no irreparable harm if the injunction did not issue. *Id.*, at pp. 1551-2.

In *Rice v. Cayetano* (*Rice v. Cayetano II*), 963 F.Supp 1547 (D.Haw. 1997), the district court granted summary judgment in favor of the state defendants, ruling that the voting restriction did not violate Rice's right to equal protection or right to vote. The court reaffirmed its earlier holdings that aboriginal Hawaiians are not eligible for federal recognition as an Indian tribe. *Rice v. Cayetano II, supra*, 963 F.Supp. at 1553.

However, in spite of this finding that they lack tribal recognition, Judge Ezra concluded that legislation favoring

aboriginal Hawaiians should be evaluated under the *Morton* rational basis test because of a guardian-ward relationship between aboriginal Hawaiians and the United States and the State of Hawaii. The district court derived this relationship from *Heckman v. United States*, 224 U.S. 413 (1912), *United States v. Kagama*, 118 U.S. 375 (1886) and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), all holding that when the United States enters into a treaty or enacts legislation for the benefit of an Indian tribe it creates a guardian-ward relationship. *Rice v. Cayetano, II, supra*, 963 F.Supp. at 1554. The district court found a similar relationship on the part of the state on the basis of *Ahuna v. Dept. of Hawaiian Home Lands*, 64 Haw. 327, 640 P.2d 1161 (1982). *Rice v. Cayetano, II, supra*, 963 F.Supp. at 1550. Applying the rational basis test, the district court found that the voting restriction was a rational measure in furtherance of the state's obligation to better the condition of native Hawaiians, imposed by Section 5(f) of the Hawaii Admission Act, 73 Stat 4, P.L. 86-3.

Similarly, the district court found that Rice's right to vote was not infringed because OHA were not engaged in governmental functions but merely managing a trust in which Rice had no interest. The court relied upon this court's decision in *Salyer Land Company v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973).

Rice appealed to the Ninth Circuit Court of Appeals. On appeal, the Court of Appeals concluded that the classification was clearly racial on its face. *Rice v. Cayetano*, 146 F.3d 1075, 1079 (9th Cir. 1998). However, since the racial classification present in the underlying legislation establishing the Hawaiian Homes Commission, § 5(f) trust and OHA were not challenged, the court accepted that these trusts were constitutional and lawful. *Id.* Further, the court reasoned the trustees have no governmental power and perform no governmental functions, but merely administer a trust in which Rice had no legal interest.

Id., at p. 1080. In this sense the court noted that the case was similar to *Salyer Land Co. v. Tulare Water Dist, supra.* But this case was not held dispositive because the classification here is racial. *Id.*

The court also noted that the case is similar to *Morton v. Mancari, supra*, but concluded that *Morton* is not dispositive because aboriginal Hawaiians are not organized as tribes and because there is no Hawaiian commerce clause in the U.S Constitution. *Id.* at p. 1081.

Without binding legal precedent, the court concluded that the classification was clearly racial on its face but did not deprive Rice of his Fifteenth Amendment right to vote because the trustees were not performing general governmental functions and because Rice had no legal interest in the trust which they administer. *Id.* at p. 1081-2.

Similarly, with respect to the Fourteenth Amendment challenge, the court rejected the strict scrutiny test established in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) and applied the rational basis test of *Morton v. Mancari, supra*, in light of the trust responsibilities owed by the state to aboriginal Hawaiians. *Rice v. Cayetano, supra*, 146 F.2d at p. 1082. Alternatively the court held that even if the strict scrutiny *Adarand* test were applied the classification would be constitutional:

> because the restriction is rooted in the special trust relationship between Hawaii and descendants of aboriginal peoples who subsisted in the Islands in 1778 and still live there — which is not challenged in this appeal. Thus, the scheme for electing trustees ultimately responds to the state's compelling responsibility to honor the trust, and the restriction on voter eligibility is precisely tailored to the perceived value that a board "chosen from among those who are interested parties would be the best way to insure

proper management and adherence to the needed fiduciary principles."

Rice v. Cayetano, supra, 146 F.2d at 1082.

Rice's petition to this court for a writ of certiorari was granted. The state defendants advanced a three pronged argument in support of the decision of the Court of Appeals. First the state argued that the voting classification was justified under the decision in *Morton v. Mancari*; second under the decision in *Salyer Land Co. v. Tulare Land Basin Water Storage Dist, supra*; and third under the trust beneficiary theory.

This court ruled that the classification was, indeed, a racial one and that it was precluded by the Fifteenth Amendment. In rejecting the *Morton v. Mancari* Indian analogy argument, this court said:

> If Hawaii's restriction were to be sustained under *Mancari* we would be required to accept some beginning premises not yet established in our case law. Among other postulates, it would be necessary to conclude that Congress, in reciting the purposes for the transfer of lands to the State — and in other enactments such as the Hawaiian Homes Commission Act and the Joint Resolution of 1993 — has determined that native Hawaiians have a status like that of Indians in organized tribes, and that it may, and has, delegated to the State a broad authority to preserve that status. These propositions would raise questions of considerable moment and difficulty. It is a matter of some dispute, for instance whether Congress may treat the native Hawaiians as it does the Indian tribes. Compare Van Dyke, The Political Status of the Native Hawaiian People, 17 Yale L. & Pol'y Rev. 95 (1998), with Benjamin, Equal Protection and the Special Relationship: The Case of Native Hawaiians, 106 Yale L. J. 537 (1996). We can stay far off that difficult terrain, however.

Rice v. Cayetano, 528 U.S. 495, 518-9 (2000).

This Court rejected the *Salyer* argument because that case was based on the Fourteenth Amendment one-person one-vote protection rather than the Fifteenth Amendment.

The trust beneficiary theory was rejected, in part, as follows:

> As an initial matter, the contention founders on its own terms, for it is not clear that the voting classification is symmetric with the beneficiaries of the programs OHA administers. Although the bulk of the funds for which OHA is responsible appears to be earmarked for the benefit of "native Hawaiians," the State permits both "native Hawaiians" and "Hawaiians" to vote for the office of trustee. The classification thus appears to create, not eliminate, a differential alignment between the identity of OHA trustees and what the State calls beneficiaries.

Rice v. Cayetano, *supra*, 528 U.S. at 523.

In his concurring opinion, Justice Breyer rejected the Indian tribe analogy with the following reasoning:

> As importantly, the statute defines the electorate in a way that is not analogous to membership in an Indian tribe. Native Hawaiians, considered as a group, may be analogous to tribes of other Native Americans. But the statute does not limit the electorate to native Hawaiians. Rather it adds to approximately 80,000 native Hawaiian about 130,000 additional "Hawaiians," defined as including anyone with one ancestor who lived in Hawaii prior to 1778, thereby including individuals who are less than one five-hundredth original Hawaiian (assuming nine generations between 1778 and the present). See Native Hawaiian Data Book 39 (1998). Approximately 10% to 15% of OHA's funds are spent specifically to benefit this latter group, see Annual Report 38, which now constitutes about 60% of the OHA

electorate.

I have been unable to find any Native American tribal definition that is so broad.

Rice v. Cayetano, supra, 528 U.S. at 526 [Breyer, J., concurring]

Relying on the decision in *Rice v. Cayetano*, on March 4, 2002, plaintiffs in the instant case, Hawaii taxpayers and general public beneficiaries of the § 5(f) trust, filed this action challenging the validity of the § 5(f) trust, the HHCA, Article XII, Sections 5 and 6 of the Hawaii Constitution and Chapter 10 of Hawaii Revised Statutes on Equal Protection grounds. A-2.

On March 18, 2002, the district court granted without comment a motion to intervene by the State Council of Hawaiian Homestead Associations (SCHHA) and it's president, a Hawaiian homesteader. A-24. SCHHA is an organization whose membership consists of Hawaiian Homestead organizations formed under the HHCA. A-2. SCHHA intervened as a defendant.

On March 25, 2002, Petitioners filed a motion to intervene. Petitioners are all native Hawaiians and either homesteaders or applicants for homestead leases. A-24-5. Petitioners moved to intervene *as plaintiffs* in order to join Plaintiffs' challenge to the provision of benefits to Hawaiians but defend against Plaintiffs' challenge to the provision of benefits to native Hawaiians. A-15.

Petitioners claimed that the state's definition of Hawaiians was a denial of their right as Native Americans to Equal Protection guaranteed to them by the Fifth and Fourteenth Amendments to the United States Constitution. Similarly, the denial of benefits secured to them by the HHCA and § 5(f) merely because of their lack of federal recognition as an Indian tribe would be a denial of their right to equal protection. A-21.

At the hearing on the motion, counsel for SCHHA stated that he was "capable, willing and, may indeed, speak with

counsel for Proposed-intervenors and present some of the arguments of Proposed-intervenors." A-29-30.

On May 8, 2002, the district court dismissed Plaintiffs' challenges to the HHCA and the § 5(f) trust on grounds of lack of standing, leaving only Plaintiffs' taxpayer challenge to the expenditure of tax revenues for the benefit of aboriginal Hawaiians. A-14.

On June 13, 2002, the district court denied Petitioners' appeal from an order by the Magistrate Judge denying their motion to intervene. A-14. The court reasoned that since Plaintiffs' public trust claims were dismissed, Petitioners had no further interest in those claims at this time. A-18. The district court ruled that Petitioners' additional claim that use of public land trust for the benefit of Hawaiians was a breach of trust was not raised by Plaintiffs and therefore not properly raised in this case. *Id.* The district court ruled that said claim should be properly brought in a separate action. *Id.*

With respect to Plaintiffs' challenge to the expenditure of tax revenues, the district court ruled that Petitioners have a protectable interest, but the claim that said expenditures should be limited solely to native Hawaiians was not raised by the Plaintiffs and should be brought in a separate action. A-20. Lastly, the district court ruled that Petitioners had not shown that the state defendants would not adequately represent them in defending against Plaintiffs' challenge to the provision of benefits to native Hawaiians. A-21.

Petitioners timely appealed to the Ninth Circuit Court of Appeals which affirmed the decision of the district court. A-4. During oral argument counsel for the OHA and the state defendants represented to the court that they would raise "all arguments necessary to defend the benefits to native Hawaiians." A-12.

With respect to Petitioners' claim that the provision of

benefits should be limited to native Hawaiians, the Court of Appeals ruled:

> We agree with the district court that Hoohuli has a significantly protectable interest against Plaintiffs' equal protection challenge in the continued receipt of benefits as native Hawaiians. We also agree that Hoohuli does not have a significantly protectable interest in its dilution claim to limit benefits to native Hawaiians. This claim is unrelated to Plaintiffs' equal protection challenge seeking to invalidate all benefits to Hawaiians and Native Hawaiians. Hoohuli is not permitted to inject new, unrelated issues into the pending litigation *Sierra Club* [*v. EPA*], 995 F.2d [1478,] at 1484 [(9th Cir. 1993)].

A-7-8.

With respect to Petitioners' claim that the denial of benefits to native Hawaiians would deprive them of their right to Equal Protection, the Court of Appeals held as follows:

> For these reasons, we hold that [Petitioners] does not overcome its *compelling burden* to demonstrate that the State and its agencies do not adequately represent its interests.

A-13 [emphasis added].

The Court of Appeals noted that the decision of this Court in *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538, n. 10 (1972) imposes a *minimal* burden upon proposed intervenors in showing inadequate representation by existing parties. A-10. But then rejected this standard in favor of a "compelling showing" standard, citing 7C Wright, Miller & Kane, *Federal Practice and Procedure: Civil, 2d* § 1909, on pages 317-8 and 332, as follows:

> The most important factor in determining the adequacy of representation is how the interest compares with the interests of the existing parties. 7C Wright, Miller & Kane,

§ 1909, at 318 (1986). When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises. *League of United Latin Am. Citizens,* 131 F.3d at 1305. If the applicant's interest is identical to that of one of the present parties, a compelling showing should be required to demonstrate inadequate representation. 7C Wright, Miller & Kane, § 1909, at 318-19.

There is also an assumption of adequacy when the government is acting on behalf of a constituency that it represents. *City of Los Angeles,* 288 F.3d at 401. In the absence of a "very compelling showing to the contrary," it will be presumed that a state adequately represents its citizens when the applicant shares the same interest. 7C Wright, Miller & Kane, § 1909, at 332. Where parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention. *City of Los Angeles*, 288 F.3d at 402.

A-11.

The opinion and judgment of the Court of Appeals was entered on March 31, 2003. An amended opinion was filed on May 13, 2003.

ARGUMENT

A. The "compelling burden" or "showing" of inadequacy of representation standard used by the Court of Appeals conflicts with relevant decisions of this Court and with decisions of other circuits.

Under Fed.R.Civ.Proc., Rule 24(a), a party seeking intervention in a civil action bears the burden of showing that the existing parties will not adequately represent the interests of the proposed intervenors. *Trbovich v. United Mine Workers of America, supra.* 404 U.S. at 538. The standard of proof in meeting this burden is minimal. *Id.*, note 10. It is not necessary

for a proposed intervenor to show that representation by existing parties *will be* inadequate but merely that it *may be* inadequate. *Id.*

When a government entity is one of the existing parties, circuit courts generally agree that there is a presumption that the government entity will adequately represent all of its citizens. There is, however, a substantial split in authorities as to the standard of proof needed to overcome this presumption.

1. The split in the circuits.

a. Cases applying minimal burden

The Fifth, Sixth and Tenth Circuits have held that the standard of proof remains minimal even though a government entity is an existing party and is presumed to be adequately representing the proposed intervenor. *Sierra Club v. Espy,* 18 F.3d 1202, 1207-8 (5th Cir. 1994); *Michigan State AFL-CIO v. Miller,* 103 F.3d 1240, 1247 (6th Cir. 1997); *Grubbs v. Norris,* 870 F.2d 343, 347 (6th Cir. 1989); *Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Dept. of the Interior,* 100 F.3d 837, 844 (10th Cir. 1996) and *Utah Ass'n of Counties v. Clinton,* 255 F.3d 1246-1254-1256 (10th Cir. 2001).

In *Sierra Club v. Espy*, environmental groups sued the Secretary of the Department of the Interior to obtain an injunction against timber sales in National Forests in Texas. Two trade associations representing timber purchasers sought to intervene. Intervention was opposed on grounds that the government could adequately represent the interests of the intervenors. The Court of Appeals applied a minimal burden standard. *Sierra Club v. Espy, supra*, 18 F.3d at 1207-8.

In *Michigan State AFL-CIO v. Miller,* a labor union sued the State of Michigan through it's Secretary of State to enjoin the enforcement of a statute requiring the union to obtain consent from its members before implementing a payroll deduction for political contributions. The Michigan Chamber of

Commerce sought to intervene as a defendant. The Sixth Circuit imposed a minimal burden in showing that representation by the state Secretary of State was inadequate. *Michigan State AFL-CIO v. Miller, supra*, 103 F.3d at 1247.

Similarly, in *Grubbs v. Norris*, prison inmates brought an action against Tennessee corrections officials challenging the conditions in state prisons. The Metropolitan Government of Nashville and Davidson County sought to intervene as a defendant. The Court applied a minimal burden. *Grubbs v. Norris, supra*, 870 F.2d at 347.

In *Coalition for Economic Growth v. Dept. of the Interior,* plaintiff brought an action against the U.S. Dept. of the Interior to enjoin a program to protect the habitat of the spotted owl. An individual environmentalist sought to intervene as a defendant. The Tenth Circuit applied a "minimal" burden of showing of the inadequacy of the government's representation of the intervenor's interest. *Coalition v. Dept. of the Interior, supra*, 100 F.3d at 844.

Similarly, in *Utah Association of Counties v. Clinton*, a public interest organization sued the President of the United States and other officials to invalidate a Presidential Proclamation establishing the Grand Staircase-Escalante National Monument. Environmental groups sought to intervene as defendants. The Court again applied a minimal burden. *Utah Association of Counties v. Clinton, supra*, 255 F.3d at 1253.

b. Cases applying strong showing.

The First, Second and Eighth Circuit Courts have held that a "strong showing" is required to overcome this presumption when a government entity is a party. *Public Service Co., New Hampshire v. Patch,* 136 F.3d 197, 207 (1st Cir. 1998); *United States v. Hooker Chemicals & Plastics Corp.,* 749 F.2d 968, 984-985 (2d Cir. 1984); *U.S. v. City of New York,* 198 F.3d 360, 367 (2nd Cir. 1999); *Mausolf v. Babbitt*, 85 F.3d 1295, 1303

(8th Cir. 1996); *South Dakota v. Lt. Ubbelohde*, 330 F.3d 1014, 1025 (8th Cir. 2003).

In *Public Service v. Patch*, a public utility brought suit against the State of New Hampshire Public Utilities Commission to challenge implementation of a plan to inject competition into the electric power market. Consumers and consumer groups and representatives sought to intervene as defendants. Other utilities sought to intervene on the plaintiff's side. The district court allowed intervention by the utilities but denied intervention by the consumers and consumer groups. In affirming the district court, the First Circuit Court held that a "strong affirmative showing" of inadequacy of representation by the members of the Public Utilities Commission had not been made. *Public Service v. Patch, supra*, 136 F.3d at 207.

In the leading case imposing the "strong affirmative showing" standard, *United States v. Hooker Chemicals & Plastics*, the United States sued a chemical company for improper disposal of hazardous chemical waste and pollution of the Niagra River. Environmental groups sought to intervene as plaintiffs. In denying the right to intervene, the Second Circuit held:

> Whether or not it is particularly helpful to speak of a "presumption" of adequate representation by the sovereign in *parens patriae* litigation, we agree with the Third, Fifth and District of Columbia Circuits that, in litigation of this sort, a *greater showing that representation is inadequate should be required.* It is not enough that the applicant would insist on more elaborate pre-trial or pre-settlement procedures or press for more drastic relief, particularly when the sovereign's interest is in securing preventive relief of the same general sort as the applicant. While it would be going too far to require an applicant to demonstrate collusion, there must be, at least in cases where the

> applicant has no independent right to sue, *cf.* Harvard Note, *supra*, at 1178-98 (distinguishing between litigable and non-litigable interests), a *strong affirmative showing* that the sovereign is not fairly representing the interests of the applicant.

United States v. Hooker Chemicals & Plastics, supra, 749 F.2d at 985 (emphasis added).

This standard was also applied in *United States v. City of New York*, where the United States brought an action against the City of New York to enforce provisions of the Safe Drinking Water Act and Surface Water Treatment Rule. In particular the United States sought to require New York City to construct a water filtration plant to process drinking water from the Croton watershed. A group consisting of citizens of the Counties of Westchester and Putnam (where the Croton watershed is located) and residents of the City of New York sought to intervene as defendants *to oppose* construction of the plant. The district court denied intervention holding that the issues raised by the proposed intervenors were not relevant to the case.

On appeal the Second Circuit held that most of the issues that intervenors sought to raise were not relevant to the case, *United States v. City of New York, supra*, 198 F.3d at 365-6, and that the intervenors had not made a "strong showing of inadequacy" of representation by the existing parties to the action with respect to the remaining issues. *Id.* at p. 367.

In *Mausolf v. Babbitt*, three individual snowmobilers and a snowmobiler association sued the Secretary of the Dept. of the Interior to enjoin enforcement of regulations restricting the use of snowmobiles in a national park. Conservation groups moved to intervene. The Eighth Circuit held that the intervenors must make a "strong showing of inadequate representation" to justify intervention. *Mausolf v. Babbitt, supra*, 85 F.3d at 1303.

In *South Dakota v. Ubbelohde*, South Dakota sued the U.S.

Army Corps of Engineers to enjoin the Corps from releasing water from Lake Oahe to maintain the flow of water in the Missouri River during a period of extended drought. Several groups of users of water in the Missouri River down stream from Lake Oahe sought to intervene as defendants. The Eighth Circuit again imposed the "strong showing of inadequate representation" standard. *South Dakota v. Ubbelohde, supra*, 330 F.3d at 1025.

c. Ninth Circuit Cases.

In the instant case the Ninth Circuit has required Petitioners to meet a "compelling burden" of showing that the state defendants will not adequately represent them. This is an even higher standard than the "strong (affirmative) showing" standard applied in the cases cited above.

This standard had never been applied before in the Ninth Circuit. Prior to this the Ninth Circuit had been in the "minimal burden" camp. In *United States v. Stringfellow*, 783 F.2d 821 (9th Cir. 1986) *vac. on other grounds*, 480 U.S 370 (1987), the Court recognized the split of authorities between the circuits, considered adopting the "strong showing" *Hooker* standard and rejected it in favor of the "minimal burden" *Trbovich* standard, as follows:

> Finally, we must determine whether CNA's interest in this litigation can be represented adequately by the original plaintiffs. In finding that the original plaintiffs adequately represented CNA's interests, the district court applied the standard of *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 987 (2d Cir. 1984), under which an applicant must make a "strong showing" of inadequate representation when the purported representative is a state or the federal government. However, this standard clearly conflicts with the law of this circuit. Consistent with *Trbovich v. United Mine Workers of America*, 404 U.S.

528, 538-39, 92 S.Ct. 630, 636, 30 L.Ed.2d 686 (1972), where the government was the purported representative, we have held that "the requirement of inadequacy of representation is satisfied if the applicant shows that representation of its interests 'may be' inadequate and . . . the burden of making that showing is minimal." *Sagebrush Rebellion, Inc. v. Watt,* 713 F.2d at 528; *see also Legal Aid Society v. Dunlop,* 618 F.2d 48, 50 (9th Cir. 1980); *Johnson,* 500 F.2d at 353-54.

U.S. v. Stringfellow, supra, 783 at 827.

2. Authority for "compelling burden" standard.

There is no authority among the circuit courts for a "compelling burden" standard or any standard greater than a "strong affirmative showing." The Court of Appeals in this case cited two sentences from Section 1909 of 7C Wright, Miller & Kane, at 318 and 332-9, respectively. The first citation is:

> If his interest is identical to that of one of the present parties, or if there is a party charged by law with representing his interest then a *compelling showing* should be required to demonstrate why this representation is not adequate.(fn 14)

Id., at p. 318-9 (emphasis added).

The only case cited for this rule of law is a Massachusetts state case, *Attorney General v. Brockton Agricultural Soc.*, 390 Mass. 431 , 434, 456 N.E.2d 1130, 1133(1983), which in turn cites 7A Wright & Miller, *Federal Practice and Procedure* at 524 as *its* authority for the rule.

The second citation from Wright relied upon by the Ninth Circuit in the instant case was:

> This is the controlling principle also when a governmental body or officer is the named party. Thus, for example, in the absence of a *very compelling showing* to the contrary,

> it will be assumed that the United States adequately represents the public interest in antitrust suits(fn25), in school desegregation cases(fn26) and in a variety of other matters(fn27), that a state adequately represents the interests of its citizens(fn28), and that a school board adequately represents the patrons of the school(fn29).

7C Wright, Miller & Kane, *supra*, § 1909 at 332-9.

None of the Circuit Court or Supreme Court Cases cited in any of these footnotes applies a "compelling burden" standard to the adequate representation requirement of Fed.R.Civ.Proc., Rule 24(a)(2). Indeed there are only four cases that even apply the "strong showing" standard. Those are: *Hooker Chemicals,* discussed above; *Baker v. Wade* 743 F.2d 236 (5th Cir. 1984); *Daggett v. Commission on Governmental Ethics & Election Practices*, 172 F.3d 104 (1st Cir. 1999); and *Hopwood v. Texas*, 21 F.3d 603 (5th Cir. 1994). Of these, *Baker v. Wade*, was reversed on hearing *en banc* in *Baker v. Wade,* 769 F.3d 289 (5th Cir. 1984) *reh.den.* 774 F.2d 1285 (5th Cir. 1985). Wright makes no mention of this fact. Also the conflict between *Hopwood* and *Sierra Club v. Espy, supra*, was resolved by the Fifth Circuit in favor of the "minimal burden" standard in *Edwards v. City of Houston,* 78 F.3d 983 (5th Cir. 1996) which cites and discusses both cases. Wright, Miller & Kane makes no mention of this either.

The footnotes from Wright, Miller & Kane do cite one Supreme Court case under footnote 28 above which might be considered to support the "compelling burden" standard. In *Nebraska v. Wyoming,* 515 U.S. 1 (1995), this Court stated:

> A State is presumed to speak in the best interests of those citizens, and requests to intervene by individual contractees may be treated under the general rule that an individual's motion for leave to intervene in this Court will be denied absent a "showing [of] some compelling interest

> in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *New Jersey v. New York*, 345 U.S. 369, 373 (1953); cf. Fed. Rule Civ. Proc. 24(a)(2).

Id., at 21-22.

However it is not the same thing to say that an intervenor must demonstrate a compelling interest as to say an intervenor has a compelling burden to show inadequacy of representation. Also this case and the cases of *New Jersey v. New York*, 345 U.S. 369, 373 (1953) and *Kentucky* v. *Indiana*, 281 U.S. 163 (1930) cited therein all involve intervention into a Supreme Court original jurisdiction action. The same interests are not involved and, therefore, the same standard need not necessarily apply.

> The Supreme Court is understandably vigilant in simplifying cases that fall within its original jurisdiction. These cases require the Court to perform the unfamiliar task of factfinding and frequently to decide issues bottomed on local law. The more time it devotes to such tasks, the less attention it can give to those matters of federal law and national import for which it is the primary overseer. Accordingly, the Supreme Court has a strong interest in restricting intervention in cases in its original jurisdiction so as to prevent those cases from becoming time-consuming multi-party litigation.
>
> The district court has a different role in the federal structure. Substantially less in terms of responsibility to the national system is sacrificed when the attention of a district court, rather than that of the Supreme Court, is drawn to multi-party cases and to matters involving local law. Consequently, the "compelling interest" test announced in *New Jersey v. New York, supra,* has full vitality for actions

in the original jurisdiction of the Supreme Court but not for suits in federal district court.

Environmental Defense Fund, Inc. v. Higginson, 631 F.2d 738, 739-40 (D.C. Cir. 1979).

In any event, if a "compelling interest" test had been applied in the instant case, Petitioners' surely should have been successful in their motion to intervene, since the Petitioners, as native Hawaiian beneficiaries of the § 5(f) trust and the HHCA, clearly do have a compelling interest "apart from [their] interest in a class with all other citizens and creatures of the state."

In the instant case, the state defendants had three distinct interests to balance—the interest of the general public in not having to contribute tax money and trust income to the betterment of the conditions of native Hawaiians, the interest of native Hawaiians as beneficiaries under the § 5(f) trust and the HHCA and the interests of Hawaiians under §§ 5 and 6 of Article XII of the Hawaii Constitution.

The Court of Appeals specifically recognized that Petitioners interest is much narrower than the interest of the general public and even that of Hawaiians by specifically point out that the presence of SCHHA in this case distinguishes it from other Ninth Circuit Court cases holding that when an intervenor's interest is narrower than that of the government it is not adequately represented, citing *Southwest Ctr. For Biological Diversity v. Berg,* 268 F.3d 810, 823 (9th Cir. 2001); *Californians for Safe Dump Truck Transp. V. Mendonca,* 152 F.3d 1184, 1190 (9th Cir. 1998). A-13.

The Court in the instant case applied a legal standard that is not supported by any authority other than a misinterpretation of the case law in 7C Wright, Miller & Kane, § 1909.

B. The Importance of this Case.

1. Certiorari should be granted to resolve the conflict among Circuit Court Cases.

This Court has not decided a case interpreting Rule 24(a)(2) of the Fed.R.Civ.Proc., in thirty years since *NAACP v. New York*, 413 U.S. 345 (1973). Prior to that, cases interpreting this rule were fairly regularly taken and decided. *Allen Co. v. Cash Register Co.*, 322 U.S. 137 (1944); *Railroad Trainmen v. B. & O.R. Co.*, 331 U.S. 519 (1947); *Sutphen Estates v. United States*, 342 U.S. 19 (1951); *Kaufman v. Societe Internationale*, 343 U.S. 156 (1952); *Sam Fox Publishing Co. v. U.S.*, 366 U.S. 683 (1961); *Cascade Nat. Gas v. El Paso Nat. Gas*, 386 U.S. 129 (1967); *Donaldson v. United States*, 400 U.S. 517 (1971); *Trbovich v. Mine Workers, supra. Trbovich* dealt with the issue of adequacy of representation in a footnote.

In the last 30 years, as shown above, the circuit courts have been diverging in their interpretation of the rule. In addition to *U.S. v. Stringfellow, supra*, the Sixth Circuit has specifically recognized the split in authority, as follows:

> As a preliminary matter, there is some dispute about the relevant standard for determining whether this [adequacy of representation] element has been met when the existing defendant is a governmental entity. The district court in *Gratz* mentioned that the plaintiff relied on *Hopwood v. State of Texas*, 21 F.3d 603 (5th Cir. 1994), for the proposition that a stronger showing of inadequacy is required when a governmental agency is involved as the existing defendant. On reconsideration, however, the district court made clear that it had simply noted the plaintiff's argument in regard to the higher *Hopwood* standard but had not applied this higher standard. In *Grutter*, by contrast, the district court does appear to have applied the more demanding *Hopwood* standard. However,

> this circuit has declined to endorse a higher standard for inadequacy when a governmental entity is involved. For example, in *Miller*, where the defendants included the Secretary of State and the Attorney General, this court clearly stated that the proposed intervenors were required only to show that the representation *might* be inadequate. *See Miller*, 103 F.3d at 1247. The district court in *Grutter* therefore erred in applying the higher standard articulated by the Fifth Circuit in *Hopwood*.

Grutter v. Bollinger, 188 F.3d 394, 400 (6th Cir. 1999).

Depending upon the standard applied a very different result can, thus, be obtained. For example, in *Hopwood v. Texas, supra,* plaintiffs sued officials of the University of Texas Law School challenging an affirmative action admissions policy. A black law student and pre-law student organization sought to intervene as defendants to defend the policy. Intervention was denied under the "strong showing" standard.

In *Grutter v. Bollinger*, plaintiffs sued officials of the University of Michigan Law School challenging an affirmative action admissions policy. Black and Latino pre-law students seeking admission and an organization in support of affirmative action programs sought to intervene. Intervention was permitted under the "minimal burden" standard.

The instant case further confuses the issue by injecting yet another even more stringent standard into the case law. This Court should grant certiorari in this case to correct this error and resolve these conflicts among the circuit court cases.

2. This case involves very important issues involving native Hawaiians and their relationship to the State of Hawaii and United States of America.

In 1921, Congress set aside 203,000 acres of land for homesteads for native Hawaiians. In 1959, that land along with

another 1.2 million acres of public land was turned over to the state of Hawaii, in trust, in part, for the betterment of the conditions of native Hawaiians.

From the time the HHCA was enacted until today, the Territory and State of Hawaii have neglected and abused native Hawaiians in flagrant breach of the trust. *Federal-State Task Force on the Hawaiian Homes Commission Act Report to United States Secretary of the Interior and the Governor of the State of Hawaii,* Honolulu, Hawaii, August, 1983; *Final Report on the Public Land Trust,* Legislative Auditor of the State of Hawaii, Rep. No. 86-17, December, 1986; *A Broken Trust, The Hawaiian Homelands Program: Seventy Years of Failure of the Federal and State Governments to Protect the Civil Rights of Native Hawaiians,* Hawaii Advisory Committee to the U.S. Commission on Civil rights, December 1991; *Progress Report on the Implementation of Recommendations of the Federal-State Task Force,* Office of the Governor of the State of Hawaii, January, 1992; *Hawaiian Homes Commission,* U.S. Dept. of the Interior, Office of Inspector General, Audit Report, Rep. No. 92-I-641, March, 1992; *Management and Financial Audit of the Department of Hawaiian Home Lands,* Auditor of the State of Hawaii, Rep. No. 93-22, December, 1993; Joint Hearings before the Select Committed on Indian Affairs, U.S. Senate and the Committee on Interior and Insular Affairs House of Representative, S. Hrg. 101-555 (August 8, 1989); Report prepared for the Senate Select Committee on Indian Affairs of the U.S. Senate, S.Prt. 102-62 (December, 1991); Hearing before the Committee on Energy and Natural Resources, U.S. Senate, S. Hrg. 102-633 (February 6, 1992); Faludi, Susan C., "Broken Promise: How Everyone Got Hawaiians' Homelands Except Hawaiians", *Wall Street Journal,* September 9, 1991, p. 1.

The State's explanation for failure to implement the HHCA has been that it lacks resources to provide the infrastructure

needed to develop homesteads. However, instead of using income from the § 5(f) trust to the development of homesteads, OHA was created as a repository for a one-fifth portion of the income from the trust lands purportedly for the betterment of the conditions of native Hawaiians. In breach of the trust condition, OHA has been accumulating this money for 25 years. Instead of working to improve the conditions of native Hawaiians, OHA has been working to change the qualifications of beneficiaries to *eliminate* the blood quantum. At the present time OHA has several hundred million dollars which it is investing while over 30,000 native Hawaiians remain on the DHHL waiting list for Hawaiian Homesteads. Some have been waiting for more than 30 years. Many of them are homeless.

Statistics available to Justice Breyer in *Rice v. Cayetano*, showed that there are 80,000 native Hawaiians and an additional 130,000 Hawaiians. *Rice v. Cayetano*, *supra*, 528 U.S. at 526. Petitioners would dispute these figures and suggest that the number of aboriginal Hawaiians totals approximately 400,000 of which approximately only 10 per cent or less qualify as native Hawaiians.

Meanwhile, OHA and the State maintain the position that native Hawaiians *are not* qualified for or entitled to recognition as an Indian tribe or tribes and that legislation by Congress is necessary to create a sovereign native Hawaiian government analogous to an Indian tribe. Bills are now pending in Congress for the so-called recognition of a sovereign Native Hawaiian entity as S. 344 and H.R. 665, commonly known as the Akaka Bill. Sec 2(6)(A) of these bills define "Native Hawaiian" as:

> Prior to the recognition by the United States of the Native Hawaiian governing entity, the term "Native Hawaiian" means the indigenous, native people of Hawaii who are the direct lineal descendants of the aboriginal, indigenous, native people who resided in the islands that

> now comprise the State of Hawaii on or before January 1, 1893, and who occupied and exercised sovereignty in the Hawaiian archipelago, including the area that now constitutes the State of Hawaii, and includes all Native Hawaiians who were eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act (42 Stat. 108, chapter 42) and their lineal descendants.

This very complicated language makes it appear as if the date of 1893 or 1921 is used as a reference point, perhaps to avoid the problem with the present definition of "Hawaiian" as pointed out by Justice Breyer. However, a careful reading shows that this definition actually eliminates any blood quantum at all. It merely states that the definition "includes" descendants of beneficiaries of the HHCA as of 1921, but is not limited thereto.

Sec 6(b)(3) of the Akaka bill provides for recognition of a Native Hawaiian governing entity by the federal government upon certification by the Secretary of the Department of the Interior that the Hawaii State Legislature has approved the organic governing documents of said entity as provided in Sec 6(b)(2)(B)[1].

The purpose of this Native Hawaiian governing entity is to reaffirm the delegation of authority by Congress to the State of Hawaii to deal with the "indigenous, native people of Hawaii," Sec. 8(a), and negotiate a settlement of native Hawaiian claims under the HHCA and § 5(f) with this Native Hawaiian governing entity.

If the State lacks the resources to even provide homesteads to the 20,000 native Hawaiians who are on the DHHL waiting list (some of whom have been waiting for 30 years or more), Petitioners do not understand how the State is going to provide

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1 Section 6(b)(3) states certification as provided in paragraph (1). However all of the provisions for certification are actually contained in paragraph (2).

for a Native Hawaiian governing entity whose membership is undoubtedly many times larger than 30,000.

Petitioners believe that the reason why the state and OHA want to drastically expand the class of beneficiaries is so that they can negotiate a settlement of native Hawaiian claims with a group largely made up of non-beneficiaries. In this way, the Native Hawaiian governing entity will be more than willing to give up claims to property which belong to the very small group of native Hawaiians so that they will be eligible to receive a portion of the proceeds. In other words, a much smaller pie will be divided among a much larger group of people. This will be a win-win situation for everyone but the present native Hawaiian beneficiaries.

Petitioners have a much different view of the situation. Petitioners note that the HHCA defines native Hawaiian with a "not less than one-half part blood" quantum. Similarly, the Indian Reorganization Act defines Indians who are not members of a formally recognized tribe as "persons of one-half or more Indian blood." 25 U.S.C. § 479.

Dept. of the Interior regulations provide a process whereby native American tribal groups can obtain tribal recognition. Unfortunately, these regulations prohibit native Hawaiians from even applying. By their own terms the regulations are applicable only to the "Continental United States" which is defined as the 49 states excluding Hawaii. 25 C.F.R. § § 83.1 and 83.3(a).

Petitioners would argue that this exclusion of native Hawaiians from the tribal recognition process is an unconstitutional racial discrimination against them. Petitioners would argue that native Hawaiians or native Hawaiian groups would qualify for tribal recognition if the criteria set forth in 25 C.F.R. § 83.7 were applied to them. This has essentially already been established in a joint report by the Departments of Justice and of the Interior. *From Mauka to Makai, the River of Justice*

Must Flow Freely, Report on the Reconciliation Process between the Federal Government and Native Hawaiians, October 23, 2000.

Petitioners would argue that they cannot be excluded from the definition of "Indian" on the basis of race as doing so would be a violation of the Equal Protection component of the Fifth Amendment. *Adarand Constructors, Inc. v. Pena, supra,* 515 U.S. at 227.

Petitioners would argue that under this Court's decision in *Morton v. Mancari, supra,* the term Indian is a political and not a racial term. Further the term Indian as used in the Indian Reorganization Act must include all native Americans as that was the intent of the Framers of the Constitution. Both prior to and after the Constitution was drafted, native Hawaiians were referred to as "Indians" by English sailors. At the time the Constitution was drafted the term "Indian" merely meant a native person and no distinctions were made between various ethnic groups of natives. See *Cook's Log,* ISSN 1358-0639, vol.6, no. 2, p. 192 (1983).

These arguments are at the heart of this case. The Court of Appeals recognized this in its opinion below, as follows:

> Hoohuli's chief objection is that existing parties will not raise as a defense that, absent discrimination by the United States, native Hawaiians should be entitled to tribal status. It claims the federal government racially discriminates against native Hawaiians through the Indian Reorganization Act, 25 U.S.C. § 479, and the Indian Self-Determination Act, 25 U.S.C. § 450. These Acts allow native persons from Alaska and the continental United States to seek tribal status. Hawaii is excluded. Consequently, native Hawaiians are not presently granted tribal recognition by Congress.
>
> Tribal recognition is significant because it allows a more deferential rational basis review of government benefit

> programs to persons of tribal ancestry under *Morton v. Mancari*. Due to the Supreme Court's recent ruling in *Rice v. Cayetano*, holding the classification "native Hawaiian" to be racial, the provision of benefits pursuant to this classification may be subject to the more demanding strict scrutiny review. We observe that in *Rice*, the Supreme Court did not address the merits of native Hawaiians' equal protection claim against the United States for the denial of tribal status, staying, in the words of the Court, "far off that difficult terrain." 528 U.S. at 519. The Supreme Court likewise avoided addressing the constitutionality of the benefits and trust structure at issue today, limiting its opinion only to the voting restriction. *Id.* at 521-22. The district court and eventually this Court may in the course of this litigation be required to venture onto this challenging terrain to resolve this difficult issue. The only question we must resolve, however, is whether existing defendants are capable and willing to make this argument should it be necessary.

A-11-2.

Nevertheless, the Court of Appeals then relied upon the state defendants' representation that they would raise "all arguments necessary to defend the benefits to native Hawaiians" in their holding that Petitioners had not met the "compelling burden" of showing the representation of state defendants inadequate. A-12. As a backup to this argument the Court of Appeals further relied upon the representation by counsel for SCHHA that he was "willing to speak with Hoohuli and raise some if its arguments." A-13, *cf* A-29-30.

These representations by opposing counsel do not satisfy the minimal burden standard of *Trbovich* holding that it is not necessary to show that representation by existing parties *will be* inadequate but merely that it *may be* inadequate.

An offer bv counsel for SCHHA to raise some of Petitioners' arguments is not adequate representation. A promise by counsel for the state defendants to raise "all arguments necessary" does not mean that they will raise ***these*** arguments. If they were going to raise ***these*** arguments, why are they spending so much time and energy arguing that ***these*** arguments are irrelevant to the case.

It is practically certain, that no matter how the district court rules in this case, the losing parties will appeal to the Ninth Circuit. It is also very likely that the losing parties on appeal will apply to this Court for a writ of certiorari. In light of the importance of these issues there is a good chance that this case will ultimately end up in this court on the merits.

If that is the case it is also of great importance that all of the relevant issues with respect to the relationship between native Hawaiians and the State and Federal governments be raised and fully litigated in the courts below. This court should grant certiorari to assure that this is the case.

CONCLUSION

Based on the foregoing argument and authorities, Petitioners respectfully request that this Honorable Court grant certiorari to review the opinion of the Ninth Circuit Court of Appeals in *Arakaki v. Cayetano*, 324 F.3d 1078 (9th Cir. 2003).

Dated: Honolulu, Hawaii, June 30, 2003.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EARL F. ARAKAKI, *et al. Plaintiffs-Appellees,* and JOSIAH L. HOOHULI *et al., Intervenors-Appellants*, and MAUI LOA, *Intervenor*, v. UNITED STATES OF AMERICA, *Defendant* and BENJAMIN J. CAYETANO, *et al., Defendants-Appellees,* and ANTHONY SANG, SR., *et al., Defendants-Intervenors-Appellees.*

No. 02-16269
D.C. No. CV-02-00139-SOM(KSC)
Filed March 31, 2003
Amended May 13, 2003

ORDER AND AMENDED OPINION

OPINION HUG, Circuit Judge:

Josiah Hoohuli and other native Hawaiians (collectively "Hoohuli") seek to intervene in a lawsuit challenging the provision of benefits by the Office of Hawaiian Affairs ("OHA"), the Department of Hawaiian Home Lands ("DHHL"), and the Hawaiian Homes Commission ("HHC") to native Hawaiians[1] and Hawaiians.[2] Hoohuli, lessees of Hawaiian homestead lands or applicants for such leases, seek intervention on the grounds that they have an interest in continuing to receive benefits as native Hawaiians, and an interest to stop the provision of benefits to Hawaiians by limiting the eligibility to only native Hawaiians.

We address whether the district court erred in denying Hoohuli's motion to intervene as a matter of right.

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1 "Native Hawaiians" are those who are descendants of the races inhabiting the Hawaiian Islands prior to 1778 with at least 50% Hawaiian blood quantum. Haw. Rev. Stat. § 10-2.

2 "Hawaiians" are those who are descendants of the races inhabiting the Hawaiian Islands prior to 1778 without reference to blood quantum. *Id.* This broader class includes the narrower class "native Hawaiians." *Rice v. Cayetano,* 528 U.S. 495, 499 (2000).

I

On March 4, 2002, Plaintiffs Arakaki et al. (collectively "Plaintiffs") filed a civil action against the State of Hawaii and various state agencies, challenging the constitutionality of race-based privileges. This suit follows closely on the heels of the Supreme Court's recent *Rice v. Cayetano* decision, which held that limiting voter eligibility to elect the trustees to the OHA to members of the racial classifications Hāwaiian and native Hawaiian violated the Fifteenth Amendment. 528 U.S. at 499.

Plaintiffs challenge the exclusive benefits given to Hawaiians and native Hawaiians by the OHA, the HHC, and the DHHL. Plaintiffs allege the provision of such benefits is racially discriminatory and violates the Equal Protection clauses of the Fifth and Fourteenth Amendments. They also allege that, as beneficiaries of § 5(f) of the Hawaii Admission Act's public land trust, the State and HHC/DHHL discriminate against them, which constitutes a breach of trust. Pub. L. 86-3, 73 Stat. 4, § 5(f) (1959) ("Admission Act"). Plaintiffs asserted standing as taxpayers, and as beneficiaries of the public land trust established by Congress in § 5(f).

On March 18, 2002, the district court granted proposed defendants-intervenors State Council of Hawaiian Homestead Association ("SCHHA"), and Anthony Sang, Sr.'s ("Sang") Motion to Intervene. The SCHHA is an organization of native Hawaiian HHC homestead lessee associations; Sang is a lessee.

On March 25, 2002, Hoohuli filed its motion to intervene. Hoohuli alleged two interests justifying intervention: (1) to ensure continued receipt of benefits for native Hawaiians; and (2) to limit the class of eligible beneficiaries to only native Hawaiians, at the exclusion of the broader Hawaiian class. Additionally, Hoohuli sought to raise as a defense to its receipt of benefits that, absent discrimination by the United States, it should be entitled to tribal status, and its benefits scrutinized under rational basis review pursuant to *Morton v. Mancari*, 417

U.S. 535 (1974). A magistrate judge denied this motion on May 2, 2002. Hoohuli timely appealed to the district court.

On May 8, 2002, the district court dismissed for lack of standing Plaintiffs' breach of the public land trust claims. It ruled that Plaintiffs' claim for relief, invalidating the stated purpose of § 5(f), rather than alleging an actual breach of the trust created by § 5(f), amounted to a generalized grievance. Since Plaintiffs were not proceeding on the basis of any direct injury, they lacked standing to complain. The district court held that the only claims remaining were Plaintiffs' equal protection challenges asserted as taxpayers against the direct expenditures of tax revenues by the legislature. Plaintiffs' motion for reconsideration of this order was denied on June 18, 2002. Plaintiffs have not appealed this order to the Ninth Circuit.

On June 13, 2002, the district court denied Hoohuli's motion to intervene, both as a matter of right and permissively. The district court first held that since Plaintiffs' public land trust claims were dismissed, Hoohuli had no significantly protectable interest in those claims at this time. The district court ruled that Hoohuli's intervention to assert additional claims of breaches of public land trusts, specifically that benefits should be limited to only native Hawaiians, was not raised by existing parties and clearly separable from Plaintiffs' remaining equal protection challenge. The district court also noted that nothing prevented Hoohuli from filing its own breach of trust suit against the State to claim benefits should be allocated to only native Hawaiians.

Next, the district court addressed Hoohuli's motion to intervene in Plaintiffs' equal protection claims. The district court observed that Hoohuli had a significantly protectable interest in the manner in which its tax dollars are used. A ruling in Plaintiffs' favor would impair Hoohuli's interest in the continued receipt of homestead leases. Hoohuli's interest in limiting benefits to native Hawaiians, however, was not encompassed by the issues before the court. Additionally, Hoohuli failed to demonstrate that the State defendants would not adequately

represent their interests. The court ruled that Defendants and Hoohuli have the same ultimate objective, and that to date, Defendants have demonstrated that they will vigorously oppose Plaintiffs' challenges to the provision of benefits to native Hawaiians. The court rejected Hoohuli's proffered justification that Defendants are inadequate because they will not argue as a defense that the Department of the Interior is engaging in unconstitutional race discrimination by excluding native Hawaiians in the definition of "Indian tribe."

The district court denied Hoohuli's request for permissive intervention because it sought to interject new issues into this action beyond the scope of Plaintiffs' claims. Hoohuli's participation would unnecessarily complicate the litigation, and existing Defendants, including native Hawaiian lessees, would vigorously seek to uphold the provision of these benefits.[3] Jurisdiction is proper before this Court pursuant to 28 U.S.C. § 1291.

II

The district court's decision regarding intervention as a matter of right pursuant to Federal Rule of Civil Procedure 24(a)(2) is reviewed de novo. *Southwest Ctr. for Biological Diversity v. Berg,* 268 F.3d 810, 817 (9th Cir. 2001).

III

Rule 24 traditionally receives liberal construction in favor of applicants for intervention. *Donnelly v. Glickman,* 159 F.3d 405, 409 (9th Cir. 1998). Courts are guided primarily by practical and equitable considerations. *Id.*

Rule 24(a)(2) gives a person the right to intervene:

> [u]pon timely application... (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant

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3 On appeal, Hoohuli does not challenge the denial of this request for permissive intervention. Therefore our review is limited to whether intervention as of right was appropriate pursuant to Rule 24(a)(2).

> is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2).

A party seeking to intervene as of right must meet four requirements: (1) the applicant must timely move to intervene; (2) the applicant must have a significantly protectable interest relating to the property or transaction that is the subject of the action; (3) the applicant must be situated such that the disposition of the action may impair or impede the party's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by existing parties. *Donnelly,* 159 F.3d at 409. Each of these four requirements must be satisfied to support a right to intervene. *League of United Latin Am. Citizens v. Wilson,* 131 F.3d 1297, 1302 (9th Cir. 1997).

When a plaintiff's action is narrowed by court order, the court may consider the case as restructured in ruling on a motion to intervene. *United States v. City of Los Angeles,* 288 F.3d 391, 399 (9th Cir. 2002).

A. Public Land Trust Beneficiary Claim

Hoohuli seeks to intervene to support in part and to challenge in part Plaintiffs' public land trust beneficiary claim created by § 5(f) of the Admission Act. Hoohuli joins in the view that provision of leasehold benefits to Hawaiians is illegal, but believes that providing benefits to native Hawaiians does not breach § 5(f) of the Act.

Assuming Hoohuli timely filed its motion to intervene, intervention is nevertheless inappropriate for the public land trust beneficiary claim. Rule 24(a) requires an applicant to demonstrate a significantly protectable interest relating to the property or transaction that is the subject of the action. *Donnelly,* 159 F.3d at 409. Here, Plaintiffs' § 5(f) public trust claim has been dismissed by the district court and not subsequently appealed before this Court. Because this trust claim is no longer

the subject of Plaintiffs' action, intervention is inappropriate as a matter of right.

We offer no comment on Hoohuli's option of filing its own § 5(f) breach of trust suit against the State to raise the claim that benefits should be restricted to native Hawaiians. We only hold that intervention is not necessary when the litigation will not impair or impede the applicant's ability to protect its interests because the claim is no longer a subject of the plaintiff's action. *Donnelly,* 159 F.3d at 409.

B. Equal Protection Claim

Hoohuli seeks to intervene as of right to address Plaintiffs' equal protection claims challenging the expenditure of tax revenues for programs that benefit only Hawaiians and native Hawaiians.

1. Timeliness

All parties concede that Hoohuli timely filed its motion to intervene. The district court did not abuse its discretion by finding Hoohuli's motion, filed three weeks after the filing of Plaintiffs' complaint, timely. *Southwest Ctr.*, 268 F.3d at 817.

2. Significantly Protectable Interest

The requirement of a significantly protectable interest is generally satisfied when "the interest is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue." *Sierra Club v. EPA,* 995 F.2d 1478, 1484 (9th Cir. 1993). The applicant must satisfy each element. *Donnelly.* 159 F.3d at 410. "An applicant generally satisfies the 'relationship' requirement only if the resolution of the plaintiff's claims actually will affect the applicant." *Id.*

The Supreme Court has yet to provide any clear definition of the nature of the "interest relating to the property or transaction which is the subject of the action." 7C Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1908, at 21 (Supp. 2002). Wright suggests the term "significantly protectable interest" has not been a term of art in the law, and sufficient

room for disagreement exists over the meaning of the term. *Id.*

Hoohuli claims that the district court found, as it was compelled to do under *Price v. Akaka*, 928 F.2d 824, 826-27 (9th Cir. 1991), that it had a protectable interest in the subject of the action. In *Price,* plaintiffs filed a § 1983 claim against the State of Hawaii, alleging that OHA managed income derived from § 5(b) lands for purposes not provided in § 5(f) on the Admission Act. *Id.* at 826. Section 5(f) lists various purposes for the trust lands and the income derived therefrom. The district court dismissed plaintiffs' suit for lack of subject matter jurisdiction and failure to state a claim. *Id.* This Court reversed, holding that plaintiffs, as beneficiaries of the § 5(f) trust, had standing to enforce the spending provisions of § 5(f). Plaintiffs demonstrated an injury in fact through the trustees' expenditure of income on purposes not specified by § 5(f). *Id.* Allowing plaintiffs to enforce § 5(f) was also consistent with common law trusts. *Id.* at 827. This Court additionally held that subject matter jurisdiction was appropriate and the Eleventh Amendment did not bar the suit. *Id.* at 827-28.

Hoohuli's reference to *Price* does not advance its motion to intervene. *Price* does not justify intervention, but rather provides authority for standing to a beneficiary seeking to enforce the § 5(f) provisions of the Admission Act. In other words, Hoohuli may rely upon *Price* to support an independent suit as a beneficiary challenging the provision of benefits to Hawaiians under § 5(f). Hoohuli's standing for a collateral suit under *Price,* however, does not alone justify a Rule 24(a) right to intervene in any § 5(f) breach of trust or equal protection litigation. Instead, to successfully intervene as of right in a pending case, Hoohuli must satisfy the four *Donnelly* requirements.

We agree with the district court that Hoohuli has a significantly protectable interest in the manner in which its tax dollars are used, specifically a continued receipt of benefits. Hoohuli, as lessees of Hawaiian homestead lands or applicants for such

leases, have a stake in the outcome of Plaintiffs' equal protection challenge. Consequently, Hoohuli's protectable interest in the continued receipt of benefits supports intervention.

Hoohuli also asserts an interest in limiting the class of beneficiaries to native Hawaiians. In order to intervene on this basis, Hoohuli must demonstrate a relationship between its interests and the claims raised by Plaintiffs. *Sierra Club,* 995 F.2d at 1484.

Here, Hoohuli does not adequately demonstrate a relationship between its dilution interest and the claims raised by Plaintiffs. Plaintiffs claim the provision of benefits from the OHA, HHC, and DHHL is racially-based and violates equal protection, and make no distinction between the grant of benefits to Hawaiians and native Hawaiians. Hoohuli's interests, on the other hand, are twofold: continuing to receive benefits, and preventing the dilution of benefits by limiting eligibility to only native Hawaiians. The district court held that Hoohuli's interest in preventing dilution of benefits went beyond the claims at issue. We agree.

Hoohuli asserts that the district court misinterpreted *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir. 1989), to reject Hoohuli's interest in the litigation as unrelated to the interests presented by either party. Hoohuli correctly observes this Circuit clarified the holding of *Portland Audubon* in *Sierra Club.* In *Sierra Club,* this Court distinguished *Portland Audubon* by broadening the scope of a "protectable interest" to include rights that are generally protected by law, and not only those interests protected by the statute under which the litigation is brought. *Sierra Club,* 995 F.2d at 1484.

Hoohuli's analysis is misplaced. First, a small technical matter: nowhere in the district court's order does it cite *Portland Audubon.* Rather, the district court cites *Sierra Club,* 995 F.2d at 1484, as authority for the proposition that a significantly protectable interest be both protectable under law and related to the claims at issue. Without directly citing any case, the district

court concludes that Hoohuli's interest in limiting the receipt of land trust benefits to only native Hawaiians was separable from the interests asserted by Plaintiffs because it was not raised by any existing party.

The magistrate judge cites *Portland Audubon* as authority for requiring an interest that the laws at issue were intended to protect. The magistrate judge also cites *Sierra Club* for requiring a relationship between the interest and the claim at issue. Neither the district judge nor the magistrate judge discuss either case beyond the general rule. This citation by the magistrate judge to *Portland Audubon* is harmless, though, because the district court does not cite this rule or rely upon the magistrate judge's analysis.

Second, despite *Sierra Club* distinguishing *Portland Audubon* on the scope of a "protectable interest," it reaffirmed the requirement that some relationship exist between the legally protected interest and the claims at issue. The integrity of *Sierra Club* is not questioned. This Court recently discussed this two-step standard for a significantly protectable interest in *Donnelly,* 159 F.3d at 409 (citing *Northwest Forest Res. Council v. Glickman,* 82 F.3d 825, 837 (9th Cir. 1996). This relationship requirement is dispositive of Hoohuli's dilution interest.

Hoohuli also relies on a First Circuit case granting intervention to black police officers to defend their promotions, as interests related to the action, against white officers alleging an impermissible promotion practice based on racial grounds. *Cotter v. Mass. Ass'n of Minority Law Enforcement Officers,* 219 F.3d 31(1st Cir. 2000). While Cotter supports Hoohuli's claim that it has an interest in defending the continued receipt of benefits, it does nothing to support its interest in preventing dilution of its benefits due to unrelatedness.

We agree with the district court that Hoohuli has a significantly protectable interest against Plaintiffs' equal protection challenge in the continued receipt of benefits as native Hawai-

ians. We also agree that Hoohuli does not have a significantly protectable interest in its dilution claim to limit benefits to native Hawaiians. This claim is unrelated to Plaintiffs' equal protection challenge seeking to invalidate all benefits to Hawaiians and native Hawaiians. Hoohuli is not permitted to inject new, unrelated issues into the pending litigation. *Sierra Club,* 995 F.2d at 1484.

3. Impairment of Interest

We agree with the district court's conclusion that a ruling in favor of Plaintiffs' equal protection challenge would impair Hoohuli's ability to protect its interest in the continued receipt of benefits as native Hawaiians. Hoohuli's interest in limiting the class of beneficiaries to native Hawaiians is not impaired by Plaintiffs' equal protection claim. We offer no comment on the merits of Hoohuli's own equal protection lawsuit challenging the provision of benefits to Hawaiians.

4. Adequacy of Representation

This Court "follow[s] the guidance of Rule 24 advisory committee notes that state that 'if an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene.'" *Southwest Center,* 268 F.3d at 822 (citation omitted). As noted above, Hoohuli's continued receipt of benefits will cease altogether should Plaintiffs prevail. Hoohuli would be justified in intervention to protect the continued receipt of benefits if it demonstrates that existing parties do not adequately protect its interest. *Donnelly,* 159 F.3d at 409. The burden on proposed intervenors in showing inadequate representation is minimal, and would be satisfied if they could demonstrate that representation of their interests "may be" inadequate. *Trbovich v. United Mine Workers,* 404 U.S. 528, 538 n.10 (1972).

This Court considers three factors in determining the adequacy of representation: (1) whether the interest of a present party is such that it will undoubtedly make all of a proposed

intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect. *California v. Tahoe Reg'l Planning Agency,* 792 F.2d 775, 778 (9th Cir. 1986).

The most important factor in determining the adequacy of representation is how the interest compares with the interests of existing parties. 7C Wright, Miller & Kane, § 1909, at 318 (1986). When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises. *League of United Latin Am. Citizens,* 131 F.3d at 1305. If the applicant's interest is identical to that of one of the present parties, a compelling showing should be required to demonstrate inadequate representation. 7C Wright, Miller & Kane, § 1909, at 318-19.

There is also an assumption of adequacy when the government is acting on behalf of a constituency that it represents. *City of Los Angeles*, 288 F.3d at 401. In the absence of a "very compelling showing to the contrary," it will be presumed that a state adequately represents its citizens when the applicant shares the same interest. 7C Wright, Miller & Kane, § 1909, at 332. Where parties share the same ultimate objective, differences in litigation strategy do not normally justify intervention. *City of Los Angeles*, 288 F.3d at 402.

Hoohuli has not overcome the presumption that existing parties will adequately represent its interests. First, based on the record before this Court, present parties have demonstrated they are capable and willing to make all of Hoohuli's arguments. Hoohuli's chief objection is that existing parties will not raise as a defense that, absent discrimination by the United States, native Hawaiians should be entitled to tribal status. It claims the federal government racially discriminates against native Hawaiians through the Indian Reorganization Act, 25 U.S.C. § 479, and the Indian Self-Determination Act, 25 U.S.C. § 450. These Acts allow native persons from Alaska and the continental United

States to seek tribal status. Hawaii is excluded. Consequently, native Hawaiians are not presently granted tribal recognition by Congress.

Tribal recognition is significant because it allows a more deferential rational basis review of government benefit programs to persons of tribal ancestry under *Morton v. Mancari*. Due to the Supreme Court's recent ruling in *Rice v. Cayetano*, holding the classification "native Hawaiian" to be racial, the provision of benefits pursuant to this classification may be subject to the more demanding strict scrutiny review. We observe that in *Rice*, the Supreme Court did not address the merits of native Hawaiians' equal protection claim against the United States for the denial of tribal status, staying, in the words of the Court, "far off that difficult terrain." 528 U.S. at 519. The Supreme Court likewise avoided addressing the constitutionality of the benefits and trust structure at issue today, limiting its opinion only to the voting restriction. *Id.* at 521-22. The district court and eventually this Court may in the course of this litigation be required to venture onto this challenging terrain to resolve this difficult issue. The only question we must resolve, however, is whether existing defendants are capable and willing to make this argument should it be necessary.

We conclude that the State defendants will adequately represent Hoohuli's int erest at trial. Counsel for the State and HHC/DHHL, and OHA have stated before this Court that it will make all arguments necessary to defend the benefits to native Hawaiians. Additionally, we are aware of no conflict that prevents the State and its agency defendants from raising this argument.

Second, Hoohuli fails to demonstrate it would offer any necessary elements to the proceeding that other parties would neglect Hoohuli shares the same ultimate objective as the State and its agencies. The State and HHC/DHHL defendants are directed by section 4 of the Admission Act, and Article XII of the Hawaii Constitution to provide benefits to native Hawaiians.

In such circumstances a presumption of adequacy of representation arises. *League of United Latin Am. Citizens*, 131 F.3d at 1305.

Finally, native Hawaiian homestead lessees, the SCHHA, have already successfully intervened as parties to the litigation. Counsel for SCHHA have stated that they are willing to speak with Hoohuli and raise some of its arguments. Not every native Hawaiian group could or should be entitled to intervene. The presence of SCHHA as a similarly situated intervenor, combined with the State defendants' specific statutory and constitutional obligations to protect native Hawaiians' interests, distinguishes this case from those in which we have permitted intervention on the government's side in recognition that the intervenors' interests are narrower than that of the government and therefore may not be adequately represented. *See, e.g., Southwest Ctr.*, 268 F.3d at 823 ("the City's range of considerations in development is broader than the profit-motives animating [intervening] developers"); *Californians for Safe Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998) (the intervenor's interests "were potentially more narrow and parochial than the interests of the public at large"); *cf. Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1499 (9th Cir. 1995) ("The Forest Service is required to represent a broader view than the more narrow, parochial interests of the [state and local government intervenors].").

For these reasons, we hold that Hoohuli does not overcome its compelling burden to demonstrate that the State and its agencies do not adequately represent its interests.

IV

The district court did not err in denying Hoohuli's Rule 24 motion to intervene as a matter of right. Hoohuli cannot intervene in Plaintiffs' breach of trust challenge to § 5(f) because this claim has been dismissed due to lack of standing. Hoohuli does have a significantly protectable interest at stake in Plaintiffs' equal protection challenge. Intervention is improper,

however, because its interests are adequately represented by existing parties. The district court is AFFIRMED.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 02-00139 SOM/KSC
EARL F. ARAKAKI, et al., Plaintiffs, vs. BENJAMIN J. CAYETANO in his official capacity as GOVERNOR OF THE STATE OF HAWAII, et al., Defendants.
Filed June 13, 2002

ORDER AFFIRMING ORDER DENYING MOTION TO INTERVENE

I. INTRODUCTION.

This is an appeal from a Magistrate Judge's ruling denying a motion to intervene in this action.

This lawsuit challenges the provision of benefits ("Benefits") by the Office of Hawaiian Affairs ("OHA"), the Department of Hawaiian Home Lands ("DHHL"), and the Hawaiian Homes Commission ("HHC") to Hawaiians and to native Hawaiians. Plaintiffs claim taxpayer standing to bring equal protection challenges to the provision of those Benefits. At the start of this suit, Plaintiffs additionally claimed that they had trust beneficiary standing to assert claims that a public land trust created by section 5(f) of the Admissions Act was being breached. On May 8, 2002, however, the court dismissed Plaintiffs' public land trust claims. Accordingly, the only claims remaining in this case are the equal protection challenges that Plaintiffs assert as State of Hawaii taxpayers.

On March 25, 2002, before the court had dismissed Plaintiffs' public land trust claims, Josiah L. Hoohuli, Patrick L. Kahawaiolaa, Virgil F. Day, Samuel L. Kealoha, Jr., James K.

Torio, and Maui Loa[1] (collectively, "Proposed Intervenors"), all claiming to be native Hawaiians, filed a motion to intervene. Proposed Intervenors sought intervention on the ground that they have an interest in seeing that they continue to receive Benefits as native Hawaiians. Proposed Intervenors also sought to stop the provision of Benefits to Hawaiians, claiming that the public land trust was being breached by the provision of Benefits to persons other than native Hawaiians like themselves.[2]

On May 2, 2002, Magistrate Judge Kevin Chang denied the Proposed Intervenors' motion to intervene. On May 13, 2002, Proposed Intervenors timely appealed. This court denies that appeal and affirms Magistrate Judge Chang.[3]

Magistrate Judge Chang did not clearly err in denying Proposed Intervenors' motion to intervene as a matter of right. The only claims remaining in this case pertain to Plaintiffs' equal protection challenge to the Benefits based on taxpayer standing. No breach of the public land trust remains in issue. Proposed Intervenors' interest in ensuring that Plaintiffs' equal protection challenge to the Benefits fails is more than adequately represented by existing Defendants.

Proposed Intervenors' intervention would unnecessarily complicate the issues in this case. Moreover, this court cannot

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1 On May 23, 2002, Walter R. Schoettle and Emmett Lee Loy filed a notice terminating their representation of Maui Loa. As this notice of termination was filed after Proposed Intervenors filed the present appeal on May 13, 2002, the court deems this order to apply to Maui Loa despite the notice of termination.

2 The term "Hawaiian" is used to refer to any descendant of the aboriginal peoples inhabiting the Hawaiian Islands who exercised sovereignty and subsisted in the Hawaiian Islands prior to 1778. The term "native Hawaiian" is used to refer to any descendent of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778.

3 Pursuant to Local Rule 7.2(d), the court finds this matter suitable for disposition without a hearing.

allow every Hawaiian and native Hawaiian individual or group to intervene in this action. Magistrate Judge Chang did not clearly err in denying either intervention as of right or permissive intervention.

II. STANDARD OF REVIEW

Pursuant to Local Rule 74.1 for the United States District Court for the District of Hawaii, as well as Rule 72(a) of the Federal Rules of Civil Procedure, this court may set aside a Magistrate Judge's nondispositive order on appeal only if it finds the order "clearly erroneous or contrary to law." Accordingly, the court must affirm the Magistrate Judge's nondispositive order unless "it is left with the definite and firm conviction that a mistake has been committed." *Dollar Rent A Car of Washington, Inc. v. Travelers Indem. Co.*, 774 F.2d 1371, 1374 (9th Cir. 1985) . *See also United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948) ("A finding is 'clearly erroneous' when[,] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed")

III. ANALYSIS.

A. The Magistrate Judge Did Not Clearly Err in Finding That the Proposed Intervenors Failed To Satisfy the Requirements for Intervention as a Matter of Right.

Proposed Intervenors first seek to intervene as a matter of right. Rule 24(a) (2) of the Federal Rules of Civil Procedure governs intervention as a right. Rule 24(a) (2) gives a person the right to intervene

> [u]pon timely application . . . [,] when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a) (2). In the Ninth Circuit, a party seeking to intervene as of right must meet four requirements: (1) the party must timely move to intervene; (2) the movant must have a significant protectable interest relating to the property or transaction that is the subject of the action; (3) the movant must be situated such that the disposition of the action may impair or impede the movant's ability to protect that interest; and (4) the movant's interest must not be adequately represented by the existing parties to the suit. *See Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998) . Each of these four requirements must be satisfied to support a right to intervene. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997)

1. Public Land Trust Beneficiary Claims

Plaintiffs claim that the public land trust created by section 5(f) of the Admissions Act is breached when Benefits are provided to only Hawaiians and native Hawaiians. Plaintiffs seek to have those Benefits provided to all members of the public. Proposed Intervenors seek to intervene to support Plaintiffs' public land trust claims, but only to the extent that those claims challenge the provision of Benefits to Hawaiians. As native Hawaiians, Proposed Intervenors say that the public land trust is being breached by the provision of Benefits to Hawaiians, but that Benefits to native Hawaiians like themselves should continue.

As Plaintiffs' public land trust claims have been dismissed, Proposed Intervenors have no right to intervene to address public land trust claims. Clearly, as discussed below, they do not satisfy all four requirements for intervention as of right on this issue.

a. Timeliness

This court has discretion in determining whether a motion to intervene is timely. *See NAACP v. New York*, 413 U.S. 345, 366 (1973). In determining timeliness, the court considers three factors: "(1) the stage of the proceeding at which an applicant

seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *Wilson*, 131 F.3d at 1308. Because Proposed Intervenors moved for intervention only three weeks after the Complaint was filed, the court agrees with the Magistrate Judge that the motion to intervene was timely filed.

b. Significantly Protectable Interest

To justify intervention as of right under Rule 24 (a) (2), Proposed Intervenors must demonstrate that they have a significant protectable interest in the subject of this action. *See Donaldson v. United States*, 400 U.S. 517, 531 (1971). The Ninth Circuit has stated that a significant protectable interest is generally sufficient when "the interest is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue." *Sierra Club v. United States E.P.A.*, 995 F.2d 1478, 1484 (9th Cir. 1993).

Proposed Intervenors claim a significant protectable interest in this action as beneficiaries of the public land trust that Plaintiffs challenged. However, because Plaintiffs' public land trust claims have been dismissed, Proposed Intervenors have no significant protectable interest in those claims at this time.

Proposed Intervenors also sought intervention as of right to assert additional claims of breaches of public land trust. Proposed Intervenors argued that Benefits should be restricted to native Hawaiians. This is not an issue raised by the existing parties and represents an interest clearly separable from the interests asserted by Plaintiffs. Proposed Intervenors have no right to intervene to assert claims beyond the scope of the issues in the present action.

c. Impairment of Interest

To demonstrate a right to intervene, Proposed Intervenors must show that they are so situated that the disposition of the action may, as a practical matter, impair or impede their ability to protect their interests. *See Donnelly*, 159 F.3d at 409. Had Plaintiffs' public land trust claims not been dismissed, Proposed

Intervenors' ability to protect their status as alleged beneficiaries of the public land trust might have been impeded. However, the dismissal of Plaintiffs' public land trust claims left Proposed Intervenors with the option of filing their own suit to raise their separate claim that Benefits should be restricted to native Hawaiians. This court expresses no opinion as to the merits of such a suit, or as to whether it would be barred by issue or claim preclusion.

d. Inadequate Representation

The fourth requirement for intervention as of right is inadequate representation by existing parties. *See Donnelly*, 159 F. 3d at 409. The Ninth Circuit considers the following factors in determining the adequacy of representation: (1) whether the interest of a present party is such that it will undoubtedly make all a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3)whether a proposed intervenor would offer any necessary elements to the proceedings that other parties would neglect. *See California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986). When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises. *Wilson*, 131 F.3d at 1305; *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996) (citing *Oregon Envtl. Council v. Oregon Dept. of Envtl. Quality*, 775 F. Supp. 353, 359 (D. Or. 1991)). The burden on Proposed Intervenors in showing inadequate representation is minimal and would be satisfied if they could demonstrate that representation of their interests "may be" inadequate. *See Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972); *Glickman*, 82 F.3d at 838.

Proposed Intervenors have failed to show that they could not or might not be adequately represented in this case with respect to the public land trust claims. The failure to make this showing was fatal to Proposed Intervenors' motion to intervene as of right even before the court dismissed the public land trust

claims. As it turns out, Defendants successfully opposed Plaintiffs' challenge to the constitutionality of Hawaii's public land trust. Defendants thereby adequately represented Proposed Intervenors' interest in continuing to receive Benefits.[4]

Accordingly, Magistrate Judge Chang did not clearly err in denying Proposed Intervenors' motion to intervene as a matter of right based on Plaintiffs' public land trust claims.

2. Equal Protection Claims

Proposed Intervenors also seek to intervene as of right to address Plaintiffs' equal protection claims challenging the expenditure of tax revenue for programs that benefit only Hawaiians and native Hawaiians. Again, Magistrate Judge Chang did not clearly err in determining that Proposed Intervenors are not entitled to intervene as a matter of right with respect to the equal protection claims.

a. Timeliness

This court has already determined that the motion to intervene was timely.

b. Significantly Protectable Interest

While Proposed Intervenors have a significant protectable interest in the manner in which their tax dollars are used, the court agrees with the Magistrate Judge that their interest in limiting Benefits to native Hawaiians is not encompassed by the issues in this case. To the extent Proposed Intervenors seek to inject new issues into this case, Magistrate Judge Chang correctly denied Proposed Intervenors intervention as of right.

c. Impairment of Interest

A ruling that Plaintiffs' equal protection rights have been

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4 As noted above, Proposed Intervenors' claim that the public land trust is being breached by the failure to restrict benefits to native Hawaiians falls outside the present action. The failure of existing parties to advance interests beyond those raised by the pleadings cannot establish inadequate representation. At most, present parties would only have to advance Proposed Intervenors' arguments to the extent they related to claims actually raised by the pleadings.

violated by the provision of Benefits to Hawaiians and native Hawaiians would impair and impede Proposed Intervenors' ability to protect their interests in the continued provision of Benefits to them.

d. Inadequate Representation

Magistrate Judge Chang did not clearly err in determining that Defendants adequately represent Proposed Intervenors' interest with respect to the equal protection claims. Defendants and Proposed Intervenors have the same ultimate objective of continuing the provision of Benefits to native Hawaiians.[5] Adequacy of representation is presumed. *See Glickman,* 82 F.3d at 838. Moreover, Defendants' arguments to date demonstrate that they will vigorously oppose Plaintiffs' challenges to the Benefits.

Proposed Intervenors do not meet even their minimal burden of showing inadequate representation. Proposed Intervenors only contend that their interests are not being adequately represented because Defendants will not argue that the Department of the Interior is engaging in unconstitutional race discrimination by not including native Hawaiians in the definition of "Indian tribe." To determine whether the *Morton v. Mancari*, 417 U.S. 535 (1974), analysis would permit preferences to be given to Hawaiians and native Hawaiians, this court may be called upon to examine the Department's definition of "Indian tribe." Proposed Intervenors do not show that this examination will necessitate a declaration by this court as to the constitutionality of that definition. Defendants' alleged refusal to argue that the definition of "Indian tribe" is unconstitutional race discrimination does not demonstrate that, in this action, the representation of Proposed Intervenors' interests "may be" inadequate. It does not appear to the court that it will

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5 While Proposed Intervenors argue that they do not share the same ultimate objective because Proposed Intervenors would like the provision of Benefits to Hawaiians to cease, this is not an issue in this action.

need to declare definitions, as opposed to disbursements, constitutional or not.

Accordingly, Magistrate Judge Chang did not clearly err in denying intervention as a matter of right to allow Proposed Intervenors to address Plaintiffs' equal protection claims.

B. The Magistrate Judge Did Not Clearly Err in Refusing to Allow Proposed Intervenors to Intervene Permissively.

Under Rule 24 (b) (2), the court may grant permissive intervention when the following three conditions are met: (1) the application is timely; (2) the applicant's claims and the main action have a common question of law or fact; and (3) the applicant demonstrates an independent ground for federal jurisdiction. *See Venegas v. Skaggs*, 867 F.2d 527, 529 (9th Cir. 1989), *aff'd*, 495 U.S. 82 (1990). Even if Proposed Intervenors satisfy these conditions, this court agrees with the Magistrate Judge that permissive intervention should be denied. *See Orange v. Air Cal.*, 799 F.2d 535 539 (9th Cir. 1986) ("Permissive intervention is committed to the broad discretion of the district court")

Magistrate Judge Chang did not clearly err in ruling that permitting intervention by Proposed Intervenors would unnecessarily complicate the litigation of this matter, as Proposed Intervenors seek to interject issues into this action that are beyond the scope of this action. Nor did Magistrate Judge Chang clearly err in ruling that the involvement of Proposed Intervenors in this action would not promote discussion of the remaining claims challenging the provision of Benefits to Hawaiians and native Hawaiians.[6] There are already multiple Defendants who are vigorously seeking to uphold the provision of those Benefits. This court cannot, as a practical matter, allow

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6 Defendants have already successfully opposed Plaintiffs' public land trust claims, making Proposed Intervenors' participation in opposing those claims unnecessary.

every Hawaiian or native Hawaiian group to intervene. Magistrate Judge Chang did not clearly err in denying permissive intervention.

IV. CONCLUSION

Because Proposed Intervenors fail to demonstrate that Magistrate Judge Chang committed clear error in denying their motion to intervene either as a matter of right or permissively, the court DENIES Proposed Intervenors' appeal from that order. Magistrate Judge Chang's order is AFFIRMED.

IT IS SO ORDERED.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

CIVIL NO. 02-00139 SOM/KSC
EARL F. ARAKAKI, et al., Plaintiffs, vs. BENJAMIN J. CAYETANO in his official capacity as GOVERNOR OF THE STATE OF HAWAII, et al., Defendants.
Filed May 2, 2002

ORDER DENYING PROPOSED-INTERVENORS' MOTION TO INTERVENE

BACKGROUND

On March 4, 2002, Plaintiff Earl F. Arakaki, Evelyn C. Arakaki, Edward U. Bugarin, Sandra Puanani Burgess, Patricia A. Carroll, Robert M. Chapman, Brian L. Clarke, Michael Y. Garcia, Roger Grantham, Toby M. Kravet, James I. Kuroiwa, Jr., Frances M. Nichols, Donna Malia Scaff, Jack H. Scaff, Allen H. Teshima, Thurston Twigg-Smith (collectively "Plaintiffs")

filed a civil action against Defendants, the State[1]("State Defendants") Office of Hawaiian Affairs ("OHA Defendants")[2], Hawaiian Home Commission/Department of Hawaiian Homes Lands ("HHCA Defendants")[3], and the United States of America (collectively "Defendants") challenging the constitutionality of race-based privileges. Specifically, Plaintiffs challenge the exclusive benefits given to persons of Hawaiian or native Hawaiian ancestry by State Agencies, in particular, the Office of Hawaiian Affairs, the Department of Hawaiian Homes Lands and the Hawaiian Homes Commission.

On March 18, 2002, District Judge Susan 0. Mollway granted Proposed-defendant Intervenors State Council of Hawaiian Homestead Association and Anthony Sang, Sr.'s motion to intervene.

On March 25, 2002, Josiah L. Hoohuli, Patrick L. Kahawaiolaa, Virgil E. Day, Samuel L. Kealoha, Jr., James K.

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1. State Defendants are Benjamin J. Cayetano in his official capacity as Governor of the State of Hawaii, Neal Miyahira in his official capacity as Director of the Department of Budget and Finance, Glenn Okimoto in his official capacity as State Comptroller, and Director of the Department of Accounting and General Services, Gilbert Coloma-Agaran in his official capacity as Chairman of the Board of Land and Natural Resources, James J. Nakatani, in his official capacity as Director of the Department of Agriculture, Seiji F. Naya, in his official capacity as Director of the Department of Business, Economic Development and Tourism, Brian Minaai in his official capacity as Director of the Department of Transportation.

2. Haunani Chairman, OHA Defendants are Apoliona, Rowena Akana, Donald B. Cataluna, Linda Dela Cruz, Clayton Hee, Colette Y. P. Machado, Charles Ota, Oswald Stender and John D. Waihe'e, IV in their official capacities as trustees of the Office of Hawaiian Affairs.

3. HHCA Defendants are Raynard C. Soon, Chairman, and Wonda Mae Agpalsa, Henry Cho, Thomas P. Contrades, Rockne C. Freitas, Herring K. Kalua, Milton Pa, and John A.H. Tomoso, in their official capacities as members of the Hawaiian Homes Commission.

Torio, and Maui Loa (collectively "Proposed-intervenors") filed their Motion to Intervene as Plaintiffs ("Motion"). On April 5, 2002, Plaintiffs filed a Response to Motion to Intervene. The State and HHCA Defendants filed their Memorandum in Opposition to the Motion on April 8, 2002. OHA Defendants filed their Joinder in the State and HHCA Defendants' Memorandum in Opposition on April 8, 2002. Defendant-Intervenor State Council of Hawaiian Homestead Associations and Anthony Sang, Sr. also filed a Joinder to the State and HHCA Defendants' Memorandum in Opposition on April 8, 2002.

The Motion came on for hearing on April 25, 2002. Proposed-intervenors were represented by Emmett Lee Loy, Esq. and Walter Schoettle, Esq.; Plaintiffs were represented by William Burgess, Esq.; State Defendants and HHCA Defendants were represented by Charleen Aina, Esq. and Girard Lau, Esq.; OHA Defendants were represented by Sherry Broder, Esq.; United States of America was represented by Thomas Helper, Esq. and Theodore Meeker, Esq.; and Defendant-Intervenor State Council of Hawaiian Homestead Associations and Anthony Sang, Sr. were represented by Robert G. Klein, Esq.

Proposed-intervenors assert that they are "native Hawaiians"[4] and either lessees of Hawaiian homestead lands under the Hawaiian Homes Commission Act of 1920 or an applicant for Hawaiian homestead lands under the Hawaiian Homes Commission Act of 1920.

Proposed-intervenors allege that the State is diluting the benefits of the trust fund established in §5(f) of the Admission Act[5] by expanding the benefits established in §5(f) to "Hawai-

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4 The term "native Hawaiian" is defined in §201 (a) (7) of the Hawaiian Homes Commission Act of 1920 meaning "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778."

5 The Admission Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4.

ians" as opposed to "native Hawaiians" as defined in the HHCA. Proposed-intervenors assert that as beneficiaries of the §5(f) trust, they have an interest in the present action.

Proposed-intervenors seek intervention to defend state funding and support of OHA and DHHL with respect to programs for the betterment of "native Hawaiians", not "Hawaiians". They argue that the State along with the OHA Defendants and HHCA Defendants are harming "native Hawaiians" by allowing funds to be used for the benefit of "Hawaiians" to the detriment of "native Hawaiians".

Proposed-intervenors assert that they have an interest in the instant action. They assert as "native Hawaiians" they have a protectable interest in preventing the dilution of benefits for "native Hawaiians" by "Hawaiians".

After careful consideration of the Motion, supporting and opposing memoranda, and the arguments of counsel, the Court hereby DENIES the Motion to Intervene.

DISCUSSION

I. Intervention of Right

Rule 24(a) (2) of the Federal Rules of Civil Procedure provides for intervention as of right "[u]pon timely application when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Fed. R. Civ. P.24 (a) (2). It is well-settled in the Ninth Circuit that to intervene as of right, four requirements must be met: (1) the motion to intervene must be timely; (2) the applicant must have a significant protectable interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the existing parties to the suit. *See*

Donnelly v. Glickman, 159 F.3d 405, 409 (9th Cir. 1998).

A. Timeliness

Timeliness is a threshold question addressed to the sound discretion of the district court. *See NAACP v. New York*, 413 U.S. 345, 366 (1973); *see also Yniguez v. Arizona*, 939 F.2d 727, 731 (9th Cir. 1991). In determining timeliness, courts consider the following three factors: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties: and (3) the reason for and length of the delay." *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1308(9th Cir. 1997).

Proposed-intervenors moved for intervention three weeks after the Complaint was filed. Thus, the Motion is timely.

B. Significantly Protectable Interest

To justify intervention as of right, Intervenors must demonstrate that they have a significant protectable interest in the property or transaction that is the subject of the suit. *See Donaldson v. United States*, 400 U.S. 517, 531 (1971)."It is generally enough that the interest is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue." *Sierra Club v. U.S. Environmental Protection Agency*, 995 F.2d 1478, 1484(9th Cir. 1993).

Proposed-intervenors must have an interest which is precisely what the laws at issue were intended to protect, and Proposed-intervenors must be precisely those who could be injured. *See Portland Audubon Society v. Hodel*, 866 F.2d 302(9th Cir. 1989).

While the Proposed-intervenors do have an interest in the lawsuit, the Court finds that Proposed-intervenors' interest is not related to the interests intended to be protected by the laws at issue in this case.

Plaintiffs are alleging violations of the Fourteenth Amendment of the United States Constitution. In pertinent part, Plaintiffs claim that Defendants are practicing discrimination by using tax revenue for race-based benefits. Essentially, Plaintiffs

are arguing that the restriction and/or provision of benefits to "Hawaiian" violates the Equal Protection Clause of the Fourteenth Amendment.

Proposed-intervenors' interest in this case is not the same interest that the Plaintiffs are seeking to advance. While Plaintiffs seek to change the status quo because of alleged discrimination, Proposed-intervenors seek to further or create a different classification allowing Proposed-intervenors to receive benefits based upon their status as "native Hawaiians". This claim or interest does not relate to Plaintiffs' discrimination claim or the position asserted by Defendant, which is to maintain the status quo.

Based on the foregoing, Proposed-intervenors lack a "significantly protectable interest" allowing them intervention as a matter of right.

C. Impairment of Interest

To meet this requirement, Proposed-intervenors must be so situated that disposition of the action may, as a practical matter, impair or impede their ability to protect that interest. *See Donnelly*, 159 F.3d at 409.

The Court cannot say that if the Proposed-intervenors are not made a party to this action, they will have no legal means to challenge the propriety of the relief sought by Plaintiffs. This litigation would not prevent any of the Proposed-intervenors from initiating their own suit alleging the misuse of funds for "native Hawaiians".

D. Inadequate Representation

The fourth requirement inquires whether Proposed-intervenors' interest is adequately represented by existing parties. *See Donnelly*, 159 F.3d at 409. The burden on Proposed-intervenors in showing inadequate representation is minimal. *See Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) The Ninth Circuit considers the following factors in determining adequacy of representation, (1) whether the interest of a present party is such that it will undoubtedly make all the intervenor's

arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the intervenor would offer any necessary elements to the proceedings that other parties would neglect. *See Tahoe Regional Planning Agency*, 792 F.2d at 778 (citations omitted).

Further, the Ninth Circuit stated that where an applicant for intervention and an existing party "'have the same ultimate objective, a presumption of adequacy of representation arises.'" *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996); *Oregon Envtl. Council v. Oregon Dept. of Envtl. Quality*, 775 F.Supp. 353, 359 (D.Ore. 1991) (citing *American Nat'l Bank and Trust Co. of Chicago*, 865 F.2d 144, 148 n. 3(7th Cir. 1989).

Proposed-intervenors have failed to show that they will not be adequately represented in this case. The Court finds that the Proposed-intervenors will be adequately represented by the Defendants. Defendants' interest is to defend the constitutionality of Hawaii's laws and to protect the trust funds. The Defendants seek to maintain the funding and benefits for "Hawaiians". Thus, because "native Hawaiians" are apparently a subgroup of "Hawaiians", Defendants will also be representing or defending the interests of "native Hawaiians". Furthermore, both Defendants and the Proposed-intervenors share an ultimate goal of preserving the constitutionally and statutorily mandated funding for "Hawaiians" and "native Hawaiians", as well as maintaining OHA and Hawaiian Homes Commission policies. This goal encompasses Proposed-intervenors' interest to maintain policies, funding and sources of revenue to continue benefits for "native Hawaiians".

Since Proposed-intervenors and Defendants share an ultimate goal in this lawsuit, Defendants will be capable of making the arguments of the Proposed-intervenors. Furthermore, at the hearing on the Motion, Counsel for Defendant-Intervenor State Council of Hawaiian Homestead Association and Anthony Sang, Sr. represented that he is capable, willing

and, may indeed, speak with counsel for Proposed-intervenors and present some of the arguments of Proposed-intervenors.

Based on the foregoing, the Court finds that Proposed intervenors have failed to meet the requirements for intervention of right because they have failed to show a protectable interest, impairment of interest and inadequate representation.

II. Permissive Intervention

Under Rule 24(b)(2), the court may grant permissive intervention if the following three conditions are met: (1) the application is timely; (2) the applicant's claims and the main action have a common question of law or fact; and (3) the applicant demonstrates an independent ground for federal jurisdiction. *See Venegas v. Skaggs*, 867 F.2d 527, 529(9th Cir. 1989), *aff'd*, 495 U.S. 82 (1990)

Even if an applicant satisfies the three threshold requirements, the district court has discretion to deny permissive intervention. *See Orange v. Air Cal.*, 799 F.2d 535, 539(9th Cir. 1986) ("Permissive intervention is committed to the broad discretion of the district court.").

While the Proposed-intervenors have met the threshold requirements for permissive intervention, the Court in its broad discretion denies permissive intervention.

The Court finds that permitting intervention by Proposed-intervenors would delay and disrupt the proceedings, as well as complicate the litigation of this matter. Furthermore, the Court is not persuaded that the involvement of Proposed-intervenors in this action would effectively contribute to the litigation of the existing claims.

Therefore, the Court exercising its discretion, denies permissive intervention.

CONCLUSION

Based on the foregoing, the Court DENIES Proposed-intervenors Motion to Intervene.

IT IS SO ORDERED.